UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Respondent,	)	
	)	CASE # 4:14-cr-00053
v.	)	
	)	
CYRUS GHARIB,	)	
	)	
Defendant/Movant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Movant/Defendant Cyrus Gharib ("Gharib"), by and through undersigned counsel, respectfully submits this Memorandum of Points and Authorities in Support of Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, and states as follows:

I. INTRODUCTION

This motion raises one issue – the improper classification of Gharib as a Career Offender under U.S.S.G. § 4B1.1. The Supreme Court's recent decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016) and the Fifth Circuit's decisions in *United States v. Tanksley,* 2017 WL 213835 (5th Cir. 2017) and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) impact the question presented here. In addition, one district court in Texas—with the Government's agreement—has already found a related *Mathis* claim retroactively applicable to cases on collateral review. *United States v. Hill*, A-06-CR-00253-SS (W.D. Tex. 2016).[1] Based on these decisions, Gharib

1 A copy of the Government's response in *Hill* and the court's ruling there is attached for the Court's convenience as Exhibits 1 and 2.

asserts that he is entitled to § 2255 relief because he is no longer a career offender and should be resentenced.

II. STATEMENT OF THE CASE

On March 12, 2014, a Federal Grand Jury sitting in the Sherman Division of the Eastern District of Texas, returned a nine-count Indictment against Cyrus Gharib and 11 codefendants. (Docket Entry "DE" 1). Gharib was charged in Counts 1, 2 and 9. Count 1 charged Conspiracy to Distribute and Possess with Intent To Distribute Anabolic Steroids; Count 2 charged Conspiracy to Possess With Intent To Distribute GHB; and Count 9 charged Conspiracy To Distribute and Possess With Intent to Distribute Less than 50 Kilograms of Marijuana, all in violation of 21 U.S.C. § 846. (DE 1). Pursuant to a written Plea Agreement (DE 306), Gharib pled guilty to Count 2. The Agreement stipulated that Gharib was a Career Offender under U.S.S.G. § 4B1.1. *Id.* at 3 ¶ 5(a). This placed Gharib's Offense Level at 32. According to the Plea Agreement, "[s]hould the Court decide that the defendant is not a career offender, the parties agree that the offense level pursuant to . . . § 2D1.1 is not to exceed 24." *Id.*

On February 29, 2016, Gharib appeared before the Honorable Marcia A. Crone, United States District Judge, and was sentenced to a 151 month term of imprisonment and three years Supervised Release. (DE 421). Judgment was entered on March 2, 2016. *Id.* Gharib did not file an appeal. This motion is timely.

III. GROUNDS UPON WHICH RELIEF IS SOUGHT

(A) GHARIB IS NO LONGER A CAREER OFFENDER IN LIGHT OF AN INTERVENING CHANGE IN THE LAW

According to Gharib's Presentence Report (P.S.I.) (DE 407), Gharib was classified as a career offender under U.S.S.G. § 4B1.1. *Id.* at 12 ¶ 46. This increased Gharib's Base Offense Level to 32, which otherwise would have been Level 24. *Id.* at 11 ¶ 45 - 12 ¶ 46.

To be a "Career Offender," U.S.S.G. § 4B1.1 Career Offender requires:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Gharib's Career Offender status was based on prior convictions for Possession with Intent to Deliver a Controlled Substance, MDMA, 4 Grams or More, but Less Than 400 Grams, (Docket No. 296-81110-01), Possession With Intent to Deliver a Controlled Substance, MDMA, More than 4 Grams, but Less Than 200 (Docket No. 296-81329-01), and a prior federal offense for Conspiracy to Possess With Intent to Distribute and Distribution of 3,4-MDMA/Ecstasy (Docket No. 3:01CR196-R). The latter federal offense is not in question. Rather, in light of recent case law, Gharib's two prior state drug convictions are no longer predicate "controlled substance offenses" for Career Offender purposes.

The Fifth Circuit recently held that delivery of a controlled substance under Tex. Penal Code Ann. § 481.112(a) does not qualify as a "controlled substance offense" under U.S.S.G. § 4B1.1. *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016). This is because Texas delivery of a controlled substance "criminalizes a greater swath of conduct than the elements of the relevant [Guideline] offense." *Id.* at 576-77 (internal quotations and footnotes omitted). *Hinkle* was based on the Supreme Court's recent decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The Fifth Circuit recently reaffirmed *Hinkle* in *United States v. Conley*, 2016 WL 7187376 (Dec. 9, 2016).

While *Hinkle* specifically dealt with Texas Delivery of a Controlled Substance, Gharib was convicted twice for *Possession With Intent to* Deliver under Texas law. *See*, State Court Judgments (DE 408) (emphasis added) (Attached hereto as Exhibits 3 & 4). But this distinction is of no import, as the Fifth Circuit has now held that Texas possession with intent priors are also no longer qualifying for career offender purposes. *United States v. Tanksley*, 2017 WL 213835 (5th Cir. 2017). Further, one district court in Texas has held that *Mathis* applies retroactively to cases on collateral review. *United States v. Hill*, A-06-CR-00253-SS (W.D. Tex. 2016). The Government conceded same in *Hill*. This Court should follow *Hill* and similarly hold that *Mathis* applies retroactively.

IV. CONCLUSION

Gharib is no longer a career offender in light of *Mathis* and *Tanksley*. This Court should accordingly grant Gharib § 2255 relief, vacate his sentence, and set this matter for resentencing.

Respectfully submitted,

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